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No. 07-460

In The
Supreme Court of the United States

CHRISTINE WELLS GROFF
and MICHAEL WELLS,

Petitioners,

v.

UNITED STATES,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit**

MOTION OF ASSOCIATED AIR TANKER PILOTS AND AERIAL FIREFIGHTERS AND CALIFORNIA FIRE PILOTS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND BRIEF OF AMICI CURIAE ASSOCIATED AIR TANKER PILOTS AND AERIAL FIREFIGHTERS AND CALIFORNIA FIRE PILOTS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION OF ASSOCIATED AIR TANKER PILOTS AND AERIAL FIREFIGHTERS AND CALIFORNIA FIRE PILOTS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Associated Air Tanker Pilots and Aerial Firefighters ("AAP") and California Fire Pilots Association ("CFPA") respectfully move this Court for leave to file the accompanying brief amici curiae in support of the Petition for a Writ of Certiorari submitted by Petitioners Christine Wells Groff and Michael Wells, the wife and stepson of the deceased air tanker firefighter, Larry Groff.

Counsel for Petitioners has consented to the filing of this brief. There has been no response from counsel for Respondent at this time, and this motion is being made out of an abundance of caution since it is presumed likely that Respondent will not agree to the filing of this brief.

The interest of AAP and CFPA in this case is immediate. AAP and CFPA represent aerial firefighters who serve under contract with the California Department of Forestry and Fire Protection ("CDF") and under the United States Department of Agriculture Forest Service National Airtanker Service Contract. If one of these firefighters is killed in the line of duty, the Department of Justice Bureau of Justice Assistance ("BJA") has taken the position that the families of the deceased pilots are *not* entitled to the federal death benefit provided under the Public

Safety Officers' Benefits Act of 1976, 42 U.S.C. § 3796(a) ("PSOBA"). The BJA maintains that they are not entitled to the benefit because the pilots are working through a contract with a third party.

Since 1980, about 87 professional firefighter pilots have been killed in the line of duty. The BJA, the administering agency, systematically denies PSOBA benefits in these instances.

For budgetary reasons, and the root of the BJA exclusion, national agencies decided not to maintain these fleets of aircraft nor their pilots and crew. Instead, they decided to contract these responsibilities to private industry for the duration of each fire season. CDF owns its planes.

The BJA's exclusion of aerial firefighters employed through a contract with a third party from PSOBA benefits is arbitrary and capricious. It contradicts the language of the statute and BJA's own reading of the statute. It also contradicts the very statutory purposes of the legislation.

The aerial firefighters are recognized as being part of the firefighting agencies and function as part of the agencies. The proposed brief examines the role of the airtanker pilots in firefighting and in the agencies, and demonstrates how BJA's position is contrary to the intent behind the PSOBA benefit, to provide recognition to the firefighters, support to the families, and to assist in recruitment.

As dramatically demonstrated in the recent Southern California fires, the role of the air tanker pilots is critical in modern firefighting. Moreover, when the President of the United States visited the fires last week, the air tanker pilots were permitted to operate and fly in the no-fly zone surrounding the Presidential party. This is in graphic contradistinction to the BJA's position that the pilots do not "serve . . . in an official capacity." The aerial firefighters function as an integral part of the firefighting force, yet the BJA refuses to acknowledge this, myopically focusing on the employment contract when the statute is broader, encompassing "service", which BJA concedes extends beyond employment. These pilots serve in an official capacity and when they die in the line of duty, their families are entitled to the PSOBA benefit being denied them by the BJA.

The foregoing considered, AAP and CFPA request that this motion be granted.

Dated: October 31, 2007 Respectfully submitted,

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QUESTION PRESENTED

1. Whether the families of professional firefighters killed in the line of duty and serving a public agency through a contract with a third party provider should be denied the federal death benefit provided under the Public Safety Officers' Benefits Act of 1976, 42 U.S.C. § 3796(a) ("PSOBA") based on a blanket per se exclusion created by the Department of Justice Bureau of Justice Assistance ("BJA") (that they are not entitled to the benefit because they are working through a contract with a third party) which is contrary to Congress's legislative intent, BJA's regulations and BJA's own interpretation of the statute?

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INTERESTS OF AMICI CURIAE[1]

Associated Airtanker Pilots and Aerial Firefighters ("AAP") is a non-profit organization whose mission is to provide a safe and efficient working environment for personnel involved with aerial fire suppression, whether on federal or state contracts. Its members include pilots under the California Department of Forestry and Fire Protection ("CDF") contract for airtanker pilots as well as the pilots under the United States Department of Agriculture Forest Service National Airtanker Service Contract.

California Fire Pilots Association ("CFPA") is a non-profit organization whose goal is to promote a safe and fair work place for pilots working under the CDF contract focusing on issues such as safety, pay, benefits and the work environment. The CFPA's membership includes 100% of the airtanker and air tactical pilots working under the CDF contract.

Amici have a common interest in this case: they represent the contract aerial professional firefighters whose families are being denied, and will be denied PSOBA benefits by the BJA if the Court permits the current BJA exclusionary policy to stand.

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[1] Counsel of record for all parties received notice of the intention to file this brief seven days before Respondent's opposition brief is due. Counsel for Petitioners have granted consent, and the response of Respondent is pending. Counsel for Petitioners assisted in authoring parts of this brief. No one other than Amici Curiae made any monetary contribution intended to fund the preparation or submission of the brief.

ARGUMENT

A. THE PER SE EXCLUSION OF AERIAL CONTRACT FIREFIGHTERS UNDERMINES THE VERY PURPOSE OF PSOBA

The PSOBA provides for the award of benefits, and a one time death benefit, to firefighters injured or killed in the line of duty serving a public agency in an official capacity. The BJA, the administering agency, has created a per se exclusion of pilots technically employed by the agency through a contract with a third party. The BJA uniformly denies PSOBA benefits in these instances. Since 1980, about 87 professional firefighter pilots have been killed in the line of duty.

The BJA's exclusion of aerial firefighters employed through a contract with a third party from PSOBA benefits is arbitrary and capricious. It contradicts the language of the statute and BJA's own reading of the statute. It also contradicts the very statutory purposes of the legislation.

The typical fire season lasts only six months each year. For budgetary reasons, and the root of the BJA exclusion, national agencies decided not to purchase, operate, and maintain these fleets of aircraft nor their pilots and crew. Instead, they decided to contract these responsibilities to private industry for the duration of each fire season. The principal national contractor is the USFS and most States obtain the aerial firefighting support they need from the USFS. On the other hand, CDF does own, maintain and

support its firefighting and observation planes, although it also obtains the professional pilot services though a contractor. The CDF supplies the planes under its contract, while the contractor supplies the plane under the national contract.

These aircraft, and their pilots, are an integral part of wildland fire incident response operations by public agencies. Retardant drops are typically used to slow the expansion of a fire, i.e., to contain or channel it, rather than put it out. These air activities are closely coordinated with the ground strike teams and controlled by the incident commander. The public agency requesting airtanker support has total tactical control over air operations at a fire site. Aerial fire fighting crews under the contracts do the same kind of work as non-contract employees, yet they are denied benefits by the BJA. They do the same kind of work and take the same risks as other fire crews, yet they are denied the benefits of PSOBA, not by statute but because of the BJA exclusionary policy.

The BJA policy is obviously capricious. For instance, a CDF air tactical or observation aircraft has two occupants, a pilot (who is employed through the contract) and a spotter (who is a CDF employee). If that air tactical plane crashed and its occupants were killed while giving directions to the airtankers dropping suppressant on a fire, the family of the CDF employee acting as spotter would be granted the PSOBA death benefit by the BJA, but the pilot's family would be denied it. Similarly, if an airtanker collided with a helicopter killing the pilots of both

aircraft, the airtanker pilot's family would be denied benefits while the helicopter pilot's family would be granted benefits (helicopter pilots are employed directly by CDF since these aircraft can be used during the "off season" for non-firefighting purposes).

Permitting this BJA per se exclusion to persist will have the opposite effect of the statutory purposes articulated by Congress for the death benefit under the PSOBA of increasing morale of fire departments, assisting in recruiting efforts, showing appreciation for public service personnel, and alleviating economic and emotional burdens on the families of the deceased public safety officers, including professional firefighters.

Air Tanker Pilots Are Integral to National Firefighting

Air tanker pilots are an integral part of firefighting tactics throughout the country, not just in the wildlands or the western United States. As James B. Hull, President, National Association of State Foresters ("NASF") testified before the Senate Committee on Energy and National Resources Subcommittee on Public Lands and Forests, February 15, 2006:

> Aerial firefighting resources are essential to the fire protection programs of most states and territories represented by NASF. Over two-thirds of the forests in the United States are in state and private ownerships.

> Fire protection in America is neither uniquely a western states' event nor is it confined predominately to federal lands. More than 80,000 wildfires occur annually across our nation. Well over 60% of those occur in non-western states and over 75% occur on non-federal lands. The key point, however, is that no single entity, including federal, state, or local government, has the capacity to handle all responses to wildfires within their jurisdictional area of responsibility. All fire protection programs are thus, by necessity, strategically integrated to most effectively and economically serve all rural lands of the nation. Aerial firefighting resources are utilized in exactly the same way; in other words, we are all in this together. Therefore, at this time it is critical that we all work together, federal and state, in developing an interagency, long-term strategy for our nation's aerial firefighting resources. We need a strategy that will provide a diverse fleet of helicopters and fixed-wing aircraft that will meet the needs of our wildfire suppression mission, and do so in a safe and airworthy and sustainable manner over the long-term. (www.stateforesters.com/testimony/2.15.06)

The aircraft and their pilots are an integral part of national and CDF firefighting capabilities and operations, and are just one part of the integrated forces used. "Aviation resources are one of a number of tools available to accomplish fire related land management objectives." National Interagency Fire Center, *Interagency Standards for Fire and Aviation*

Operations 2007 ("*Interagency Standards*"), Chapter 17, Aviation Operations/Resources, Purpose and Scope, page 17-1. As the *Interagency Standards*, at Chapter 1, at 01-5, graphically summarize the complexity of fire and the response to it:

> The Nature of Fire Operations
>
> Fire is a complex, dynamic, and often unpredictable phenomenon. Fire operations require mobilizing a complex organization that includes management, command, support, and firefighting personnel, as well as aircraft, vehicles, machinery and communications equipment. While the magnitude and complexity of the fire itself, and of the human response to it, will vary, the fact that fire operations are inherently dangerous will never change. A firefighter utilizing the best available science, equipment, and training, and working within the scope of agency doctrine and policy, can still suffer serious injury or death.

As a matter of national policy, air tankers are a national resource. *Interagency Standards*, Chapter 17, Aviation Operations/Resources, Airtankers, page 17-9. This is even though they are obtained through contract. 2007 National Airtanker Service Contract, C.1.1(c), Objectives, page 7: "Airtankers awarded under this contract are considered national resources."

In the context of PSOBA benefits, the logic is devastating. The plane under contract is a national

resource, but, according to the BJA, the family of the contracted pilot killed flying that plane while fighting a fire threatening people, public and private property is not entitled to the PSOBA benefit.

Airtankers are capable of being the initial weapon against fires in remote or difficult terrain. They can get to the fire before the ground personnel are able to reach the fire. Airtankers also support the efforts of the ground personnel, and act in a coordinated support capacity.

Devastating Fires in the Wildlands Demand Aerial Firefighting

Of course, it is the wildland areas that are primarily increasingly susceptible to large fires. Of significant concern is the rapidly expanding interface zone between wildlands and developed areas, the so-called wildland-urban interface ("WUI"), and changing climate conditions are producing longer fire seasons and more catastrophic fires.

As the on-going fires throughout Southern California have dramatically demonstrated, the airtanker fleet is of critical importance in fighting fires in the WUI where a significant amount of the major fires are happening. 60% of new housing was built in the WUI between 1990-2000, and as many as 42 million homes are located in the WUI. (The wildland-urban interface "the area where structures and other human developments meet or intermingle with undeveloped wildland.") United States Department of Agriculture,

Forest Service, *Accomplishing and Applying National Fire Plan Research and Development From 2001-2005*, Section 4:15, page 35, and section 4:16, page 37 (May 2007).

Moreover, the bulk of expert opinion is that there is a strong correlation between the increase in large scale wildland fires in the Western states and the changing climate conditions. As published in *Global Warming Amplifies Western Forest Fire Seasons*, Global Business Council for Sustainable Development, www.wbcsd.org, July 6, 2006 states:

> Climate models show that warmer springs and summers will likely continue to intensify, further increasing large wildfires and making forest management techniques such as thinning and fire suppression ineffective, according to the report by scientists at the Scripps Institution of Oceanography and the University of Arizona, to be published later today in the journal Sciencexpress.
>
> "The projected regional warming and consequent increase in wildfire activity in the Western U.S. is likely to magnify the threats to human communities and ecosystems, and significantly increase the management challenges in restoring forests and reducing greenhouse gas emissions," the report states. The Forest Service, National Oceanic and Atmospheric Administration and California Energy Commission funded the research.
>
> The average number of wildfires increased by a factor of four in the mid-1980s, burning

> an area 6.5 times greater than in the 1970s, as the fire season expanded and fires became more frequent and burned longer than in previous years. Annual changes in wildfire frequency appears "to be strongly linked to annual spring and summer" temperatures with "many more wildfires burning in hotter years than in cooler years," the report states.

As the United States Fire Service describes the escalating situation in the *Healthy Forests, the National Fire Plan – Healthy Forests Initiative*, Overview, Page 4:

> In recent years, most of us have seen televised pictures of wildland fires, evacuated communities, burned homes, and blackened forests, or witnessed these fires first hand. In 2002, Arizona, Colorado, Oregon and New Mexico, each had their largest timber fire in a century. The most devastating series of wildland fires in state history swept Southern California during October 2003. These fires killed 24 people, destroyed more than 3,700 homes, and burned 750,000 acres. Alaska set a record for acres burned in 2004. And, while fire has always helped shape our landscape, today's fires are not those of the past; they are often hotter, more destructive, and more dangerous to fight.
>
> We know in part the reason for the difference. Compared with earlier times, many of today's forests often have unprecedented levels of flammable materials including among other materials: underbrush, needles, and leaves.

> In the interior West for example, Ponderosa pine forests range from Arizona and New Mexico northward into Idaho. A century ago such a forest may have had some 25 mature trees per acre and be easily traversed on horseback or by a horse-drawn wagon. Today that same forest may have more than 1,000 trees on the same acre creating conditions that are much too thick for the passage of a hiker. These tightly packed trees are smaller, weaker, more disease prone, and more susceptible to insect attack than their ancestors. Such forests form huge reservoirs of fuel awaiting ignition, and pose a particularly significant threat when drought is also a factor.

Fires in the WUI create their own problems for the aerial firefighters. They are often in areas of hilly terrain, with wires, trees, and the heat of the fires themselves generate their own idiosyncratic winds. These areas present especially challenging environments for the aerial firefighters, especially when their concentration is on the pinpoint delivery of 1200 gallons of fire retardant while flying at 120-140 knots. Flying a fire suppression mission can be extremely hazardous. Pilots fly heavily loaded aircraft, through thick smoke and shifting winds, over rugged terrain with tall trees and power lines. They often must make tight turns to hit a fire drop zone in a mountain ravine where the fire retardant is dropped from an altitude of only 150 feet.

The demands of modern aerial firefighting are intensive and call for a highly trained and disciplined force. Fortunately the mortality rate has dropped, from about 20 per 100,000 flight hours to about four per 100,000 flight hours: about the same as a military combat squadron. The rate reduction is due to a combination of better pilot training, sturdier aircraft, and refined flight policies. However, it is critically important to maintain the firefighting force, to build on the training and experience that has developed, and to bring in and develop fresh recruits. The BJA exclusion hinders these demands and national policy.

Besides natural causes, there is also the additional concern of arson. This too has raised its head in the recent Southern California fires. The F.B.I. has long been concerned that domestic terrorists use arson in the wildlands as a terrorist weapon. (Testimony of James F. Jarboe, Domestic Terrorism Section Chief, Counterterrorism Division, Federal Bureau of Investigation, before the House Resources Committee, Subcommittee on Forests and Forest Health hearing on "Eco-terrorism and Lawlessness in the National Forests", February 12, 2002.)

The BJA Exclusionary Rule Is Contrary to the Intent of the PSOBA

The PSOBA is a recognition of the extraordinary risks public safety officers face. In the course of adopting the statute, Congress specifically expressed

Davis v. United States, 50 Fed.Cl. 192, 207 (Ct. Cl. 2001):

> "The motivation for this legislation is obvious: The physical risks to public safety officers are great; the financial and fringe benefits are not usually generous; and the officers are generally young with growing families and heavy financial commitments. The economic and emotional burden placed on the survivors of a deceased public safety officer is often very heavy.
>
> The dedicated public safety officer is concerned about the security of his family, and to provide the assurance of a Federal death benefit to his survivors is a very minor recognition of the value our government places on the work of this dedicated group of public servants.
>
> *S. Rep. No. 94-816,* at 3-4, reprinted in *1976 U.S.C.C.A.N.* at 2505. See also *Demutiis,* 48 Fed.Cl. at 85-86." *Davis v. United States,* 50 Fed.Cl. 192, 208 (Ct. Cl. 2001)

As the BJA announces in its website on the PSOBA:

> Enacted in 1976, the Public Safety Officers' Benefits (PSOB) Act (codified at 42 U.S.C. 3796, et seq.):
>
> - Assists in the recruitment and retention of qualified public safety officers.
> - Establishes the value that communities place on contributions from those

> who are willing to serve their communities during potentially dangerous circumstances.
>
> Offers peace of mind to men and women who are seeking careers in public safety.

However, BJA's exclusion of contract pilots directly countermands this purpose.

1. BJA's Exclusionary Policy Hinders Recruitment At A Critical Time

Recruitment is an acknowledged problem in firefighting generally. It is of particular concern for staffing the airtanker fleet where the average personnel age is already far higher than ground firefighting units. For instance, among the 53 pilots under contract for the CDF in 2007, 74% were over 50 years old, with 35% over 60 (6% were 20-29; 10% 30-39; 10% 40-49; 39% 50-59). The profile of the pilots working under the national contract is similar. While there is a benefit gained from experienced pilots, there is a need to replenish the supply of pilots. This is especially important at this time, when the number of large scale wildland fires is increasing, and there is increasing fire activity in the ever-growing WUI.

The firefighting careers of these experienced pilots extend beyond the individual periods of the agency contracts. The pilots fly for the same public firefighting agencies regardless of what entity is awarded the services contract from one period to

another. There are not competing groups of pilots available for contract. (For instance, most of the pilots over 50 years old have been with the CDF for over 20 years, although the contractor's name has changed about four times in that time.) The same pilots work for whatever the name of the entity that may have the CDF contract or the national contract for that particular period.

Exclusion from the PSOBA benefits hinders recruitment efforts. Significantly, *most firefighting pilots cannot obtain life insurance due to the inherent dangers of the work.* Although California has enacted legislation that compels the contractor to provide life insurance, there is no equivalent legislation for the pilots under the national contract. In any case, the PSOBA benefit was not an alternative to life insurance, but a one time benefit in addition to any life insurance, seen as a form of recognition and to enhance recruiting. These considerations are of special significance to aerial firefighters.

2. BJA's Exclusionary Policy Denies Respect and Recognition

A central purpose of the PSOBA benefits was "to provide the assurance of a Federal death benefit to . . . survivors" as "a very minor recognition of the value our government places on the work of this dedicated group of public servants." *S. Rep. No. 94-816*, at 3-4, reprinted in *1976 U.S.C.C.A.N.* at 2505;

Davis v. United States, 50 Fed.Cl. 192, 208 (Ct. Cl. 2001).

The BJA's exclusionary policy denies the families of the deceased pilots these benefits. It robs them of the peace of mind that Congress intended. Moreover, it is only the BJA and its exclusionary policy that does not recognize that airtanker pilots are serving a public agency in an official capacity. For instance, the fallen pilots are recognized by the United States Congress. The families of the fallen firefighter pilots, such as Mr. Lars Stratte and Mr. Larry Groff who were both killed in 2001 and had their claims rejected by the BJA, received from the United States Congress a "Certificate of Special Congressional Recognition" in memory of the fallen firefighter stating "I join with the Community in recognizing Your Unselfish Public service, and for Paying the Ultimate Price in Defending the People of this Great Nation." The fallen firefighters are memorialized at both the National Fallen Firefighters Monument and the California Firefighters Memorial.

For the pilots killed while flying under the CDF contract, the Governor of California and the CDF have recognized them as being members of the CDF. The CDF uniformly refers to them as being part of its forces.

The BJA policy is to not only deny the claims, but to discourage the claims. It is routine for the family of a fallen pilot to be told that contract pilots are not covered in response to an enquiry for PSOBA benefits. The

BJA also sends the family a copy of the *Holstine* decision in response to a request for PSOBA benefits and claim form. This clearly underscores that the exclusion is a blanket policy employed by the BJA, and that, even when it was bound to by its own regulations, it did not.

B. THE PILOTS ARE PUBLIC SAFETY OFFICERS SERVING PUBLIC AGENCIES IN AN OFFICIAL CAPACITY

The PSOBA provides:

> In any case in which the Bureau of Justice Assistance (hereinafter in this subchapter referred to as the "Bureau") determines, under regulations issued pursuant to this subchapter, that a public safety officer has died as the direct and proximate result of a personal injury sustained in the line of duty, the Bureau shall pay a benefit of $250,000. [42 U.S.C. § 3796(a)]

A public safety officer is defined by PSOBA, in relevant part, to be "an individual serving a public agency in an official capacity, with or without compensation, as a law enforcement officer, as a firefighter, as a chaplain, or as a member of a rescue squad or ambulance crew . . . " 42 U.S.C. § 3796b(9)(A) (formerly codified at 42 U.S.C. § 3796b(8)(A)). The operative definition of "firefighter" in the *Groff* case "includes an individual serving as an officially recognized or designated member of a legally organized volunteer fire department". 42 U.S.C. § 3796b(4). The

BJA acknowledged Mr. Groff as qualifying as a "firefighter."

The pilots working for the public agencies under contract through the third party providers serve these agencies in an official capacity. The differences between a CDF helicopter pilot and an airtanker pilot is the piece of equipment and where the paycheck comes from. Both fly under CDF rules and are directed by CDF personnel. For instance, a CDF contract air tanker pilot completes the same pilot application form as a CDF helicopter pilot. The Interagency Card is also the same. This Interagency Card gives the holder the right to fly a plane, or helicopter as the case may be, for the CDF or USFS, and also allows the pilot to operate as a firefighter and take control of fire scenes. It also gives the pilot the responsibility of initial attack on a fire, and is entrusted with the public safety to act as initial attack. The Interagency Card holder can close down airspace and state and federal highways if they see these actions as necessary. The Interagency Card is issued by the agency, CDF or USFS, not the contractor. The Interagency Card entitles the pilot to operate on fires on private and public lands, whether federal or state, and under the interagency agreements. The holder operates and is a State fire officer, and acts as a pilot-in-command of a fire scene. In the recent Presidential visit to Southern California during the fires, the Interagency Card holder firefighters were the only aircraft permitted to fly in the temporary no fly area created for the President.

The pilots perform an official function, flying a public aircraft as part of the public firefighting force to put out a fire threatening state owned property, people's lives and private homes. In the case of CDF pilots, they are stationed at CDF air attack bases, fly CDF planes as ordered by CDF controllers. They drop fire retardant under CDF direction while fighting a fire as part of the overall CDF incident response effort where their actions are integrated with all other CDF units on the ground and in the air. They have the authority as a State firefighter pilot under the Federal Aviation Regulations to close airspace to civil aircraft, to get priority handling from the FAA on airspace use, and to give orders as necessary to suppress wildland fires. Except for the way they are provided their paycheck, there is no difference between them and a direct CDF employee.

There is no restriction in the PSOBA that restricts the benefits to direct employees only. Even in the unpublished *Holstine* decision issued by the BJA when it initially denied a contract pilot benefits, the BJA employed a working definition that did not restrict the benefits to employees only. As with the language of the statute, "serving . . . in an official capacity", the agency definition included in *Holstine* is broader than "employee", focusing on function and a relationship "similar" to an officer, employee, or volunteer. In *Holstine*, the BJA included a definition of the meaning of "serving . . . in an official capacity."

> In order to be serving a public agency in an official capacity one must be an officer, employee, volunteer, or similar relationship of performing services as a part of a public agency. To have such a relationship with a public agency, an individual must be officially recognized or designated as functionally within or a part of the public agency.

In *Holstine*, the BJA ignored its own working definition and denied a PSOBA benefits claim relating to a privately employed pilot who was killed while performing state aerial firefighting duties. The BJA relied upon two factors: (1) the contract between CDF and the third party contractor, which included the *pro forma* provision that the contractor, its agent and employees "shall act in an independent capacity and not as officers or agents of the State of California", and (2) one colloquy in the House as "proof" of Congressional intent to exclude contractors from PSOBA coverage, to wit:

> Rep. Myers: "Could the gentleman tell me, is there any way in which this bill would apply to privately employed safety or security officers?"
>
> Rep. Eilberg: "No, it would not."
>
> Rep. Myers: "What if they were called by a local arm of the government or the local police organization to assist in any way?"

> Rep. Eilberg: "It is my opinion that they would not be included."

122 Cong. Rec. 12002, 12009 (1976).

As set forth in detail in this brief, this isolated reference to an *ad hoc* call for assistance to a private security guard does not bear any resemblance to the integrated role of the aerial firefighters in modern firefighting.

In the face of its stated definition, the BJA's practice of holding that an official capacity *per se* cannot exist when a contractor or privately-employed individual provides service for the public agency is erroneous and unreasonable. Someone serving a public agency in an official capacity who is not an employee but in a "similar relationship", who is functionally a part of the public agency is supposed to be covered according to the BJA's interpretation. The BJA's inquiry begins and ends with the fact that he was employed through a contractor and they almost exclusively focus on the face of the contract.

C. AS THE FEDERAL CLAIMS COURT FOUND IN *GROFF*, THE PILOTS HAVE A SIMILAR RELATIONSHIP TO AN EMPLOYMENT OR VOLUNTEER RELATIONSHIP AND ARE OFFICIALLY RECOGNIZED AS FUNCTIONALLY PART OF THE AGENCY

The BJA routinely ignores the facts showing the nature of the work and the day-to-day control exerted by the agencies, such as the CDF. Instead, the BJA

myopically focuses on the employer-employee relationship between the contractor and the pilot and the contract language governing the relationship between the agency and the contractor. In so doing, this elevates form over substance and ignores the concept of "service." *United States v. R.F. Ball Constr. Co.*, 355 U.S. 587, 593, 78 S.Ct. 442, 2 L. Ed. 2d 510 (1958) ("Substance, not form or labels, controls the nature and effect of legal instruments."), reh'g denied, 356 U.S. 934, 78 S.Ct. 770, 2 L. Ed. 2d 763 (1958). Unfortunately, this is a common occurrence with the BJA and PSOBA benefits.

1. Mr. Groff was in a Similar Relationship to An Employee of a Public Agency at the Time of His Death

As the Federal Claims court correctly noted in the *Groff* case, the airtanker pilots like Mr. Groff are "a clear example of a non-employee who nonetheless is similarly providing services as part of a public agency, much like a public employee." As the Federal Claims court pointed out in the *Groff* case, the BJA "apparently chose to disregard the CDF's official recognition that Mr. Groff was a functional part of the CDF." This is what the BJA routinely does in the case of the contract pilots. The BJA's refusal to accept the CDF's clear official recognition that Mr. Groff was functionally within the CDF has no support in the representations of the CDF and "is unwarranted." (*Groff* Appendix ["App."] p. 70a.) Once again, despite the fact the BJA was required to give substantial

weight to the CDF's findings, it failed to do so. Based on the above, the CDF clearly recognized Mr. Groff as functionally within the CDF at the time of his death, and, accordingly, the BJA's own "official recognition" test is satisfied. (App. p. 70a.)

First, the CDF procedures handbook for pilots fighting fires for the CDF demonstrates that Mr. Groff was "fully integrated into the firefighting services of the CDF." (App. p. 57a.) The Federal Claims court analyzed the administrative record and found that:

> During operations, Mr. Groff was supervised by a CDF air tactical supervisor who would "ordinarily fly in an orbit above the level of the airtankers and . . . describe targets to the airtanker and helicopter pilots." The CDF dispatched the planes flown by pilots, including Mr. Groff. The CDF specified what uniforms pilots would wear. Mr. Groff and others were required to participate in mission debriefings and were evaluated by CDF personnel. Contractor pilots had CDF credit cards for refueling.

(App. p. 57a.)

Second, following Mr. Groff's death, a CDF official wrote two letters describing the nature of Mr. Groff's services and his relationship to the CDF. The letters, written to the BJA from the CDF Deputy Chief of Aircraft Maintenance and Engineering, set forth various aspects of Mr. Groff's services. Specifically, the CDF official noted that, among other things,

Mr. Groff was a carded airtanker pilot authorized to operate State fire fighting aircraft, that the State of California and the United States benefited from Mr. Groff's operations, that Mr. Groff was operating the airtanker for the State of California on State fires, that Mr. Groff operated the aircraft owned by the State and at the direction of CDF dispatchers and airborne air attack officers, that he slept in State bases, ate State furnished meals, and was required to wear a State supplied flight suit and helmet. (App. p. 59a-61a.)

Importantly, the CDF official noted that the CDF sets pilot standards, approves hiring and training of each pilot, and issues airtanker cards to the pilots "for State duty." (App. p. 61a.) The CDF noted that the "sole function of the contractor (SJH, in this case) was/is to provide a means of paying the pilots. . . ." (App. p. 61a.) These are "recitations of fact" by a governmental agency that should have been considered by the BJA. Based on these facts, the Federal Claims court correctly found that Mr. Groff was functioning as a part of the CDF when he was performing firefighting services, "much like a CDF employee." (App. p. 61a.) The BJA, however, failed to give substantial weight to these findings, as it was required to do. *Demutiis v. United States*, 291 F.3d 1373, 1379-80 (Fed. Cir. 2002).

The Federal Claims court correctly noted that the BJA failed to give substantial weight to the CDF's findings. This is yet another example of the fact the BJA erred finding that Petitioners were ineligible for

benefits and that the BJA's failure to accord weight to these facts was unreasonable.

2. Mr. Groff was Officially Recognized and Designated as Functionally Within the CDF

The record is replete with examples of official recognition by the CDF of Mr. Groff's services showing he was officially recognized or designated as functionally within the CDF or a part of the CDF. As the Federal Claims court noted, the CDF referred to Mr. Groff as "one of our pilots." (App. p. 58a.) Mr. Groff was identified as a "State firefighter pilot." (App. p. 60a.) Moreover, the CDF directly addressed the issue of Mr. Groff's official recognition and his role within the CDF:

> Captain Groff was, in our opinion, serving as an officially recognized and designated member of the California Department of Forestry and Fire Protection. . . . The following facts support our claim. . . .
>
> 1. Mr. Groff was an interagency "carded" Airtanker Pilot. This designation authorized Mr. Groff to operate a State fire fighting airtanker as Pilot-in-Command. Mr. Groff had the authority, duty and obligation to respond to wildland fires and to take immediate and independent action to suppress and combat wildfires.

> 8. [California] Governor Gray Davis issues a Statewide proclamation designating Mr. Groff as a firefighter and a hero.
>
> 9. Mr. Groff's name has been added to the State firefighter's memorial located in the State Capitol.
>
> 10. Mr. Groff's name has been added to the national firefighter's memorial in Maryland.

(App. p. 65a-66a.)

As the Federal Claims court pointed out, the BJA "apparently chose to disregard the CDF's official recognition that Mr. Groff was a functional part of the CDF." (App. p. 66a.) The BJA's refusal to accept the CDF's clear official recognition that Mr. Groff was functionally within the CDF has no support in the representations of the CDF and "is unwarranted." (App. p. 70a.) Once again, despite the fact the BJA was required to give substantial weight to the CDF's findings under *Demutiis*, it failed to do so. Based on the above, the CDF clearly recognized Mr. Groff as functionally within the CDF at the time of his death, and, accordingly, the BJA's own "official recognition" test is satisfied. (App. p. 70a.)

CONCLUSION

For the reasons set forth above and in Petitioner's brief, this Court should grant the Petition for a Writ of Certiorari requested in this case.

Dated: October 31, 2007.

Respectfully submitted,

ROBERT E. THOMPSON